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No. 94-1039

In The

Supreme Court of the United States

October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

vs.

RICHARD G. EVANS, ANGELA ROMERO, LINDA POWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State of Colorado Case Nos. 94SA048 and 94SA128

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QUESTION PRESENTED

Whether an initiated state constitutional amendment that forbids the state and all local governments from adopting or enforcing any law or policy protecting gay people from public or private discrimination violates the Equal Protection Clause of the Fourteenth Amendment because it burdens the fundamental right of gay people to participate in the political process and it fails rationally to advance a legitimate governmental purpose.

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STATEMENT OF CASE

The issue in this case is whether a state constitutional amendment that forbids the state government and all local governments from adopting or enforcing any law or policy protecting gay people from discrimination on the basis of their sexual orientation violates the Equal Protection Clause of the Fourteenth Amendment. Amendment 2, adopted by Colorado voters in 1992, provides,

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

I. Proceedings Below

Shortly after passage of Amendment 2, the plaintiffs filed suit in Denver District Court, requesting a declaration that Amendment 2 is unconstitutional and an injunction to prevent enforcement of the amendment. The individual plaintiffs are lesbians and gay men who had worked to obtain legislation or government policies that protect them from discrimination.[1] They claimed that

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[1] The plaintiffs are the respondents here and will be referred to as "the plaintiffs" in this brief. The individual plaintiffs include Richard Evans, an administrator for the City and County of Denver, Angela Romero, a Denver police officer, John Miller, a professor and chair of the University of Colorado's faculty council, Paul Brown, an employee of the Colorado Department of

Amendment 2 violates their right to equal protection of the laws because Amendment 2 places unique burdens on their ability to participate in the political process and does not rationally advance any legitimate governmental purpose. The governmental plaintiffs, the cities of Denver, Boulder and Aspen and the Boulder Valley School District, claimed that Amendment 2 impermissibly restricts their ability to guarantee the rights of individuals to equal protection.

On January 15, 1993, the Denver District Court granted the plaintiffs' motion to preliminarily enjoin the enforcement of Amendment 2. The Colorado Supreme Court affirmed the district court ruling in *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993), Pet. App. D, holding that Amendment 2 is subject to strict judicial scrutiny because it "fences out" an independently identifiable class of persons and burdens class members' fundamental right to participate in the political process. The appellate court remanded the case to allow the state to attempt to prove that the amendment serves a compelling interest.

After trial, the district court ruled that Amendment 2 does not serve any compelling state interest by the least restrictive means. The court permanently enjoined the enforcement of Amendment 2 and certified its decision as final under C.R.C.P. 54(b).[2] The Colorado Supreme Court

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Natural Resources, Priscilla Inkpen, a Boulder minister, and Linda Fowler, who chaired the Denver mayor's task force on gay and lesbian issues. They sought, through the political process, local ordinances, a governor's executive order, police department regulations, and a university non-discrimination policy, all of which were intended to prohibit discrimination on the basis of sexual orientation. R.7:13,16,50-52,87-91,104-16,142.

[2] Under C.R.C.P. 54(b), the court certified as final only its ruling that Amendment 2 violates the plaintiffs' Fourteenth Amendment right to participate in the political process. J.A.267-68. Thus, although the plaintiffs could not cross-appeal

upheld the permanent injunction, affirming the district court's determination that Amendment 2 does not serve any compelling state interest.[3] *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), Pet. App. B.

II. Factual Background

To understand the purpose and effect of Amendment 2, it is necessary to review (1) the history of anti-discrimination law in Colorado prior to Amendment 2's enactment; (2) the legislative history of Amendment 2; and (3) the scope and meaning of the amendment.

A. History of Anti-Discrimination Law in Colorado Prior to Amendment 2's Enactment.

State and local law in Colorado prohibits arbitrary or unfair public and private discrimination in various commercial and governmental contexts. Some state and local laws enumerate specific grounds that are deemed to be impermissible bases for decision-making, such as veteran's status, marital status, race, age, disability, and political affiliation. *See, e.g.*, C.R.S. § 24-34-402; Denver Mun. Code art. IV § 28-91(b), J.A.32; Boulder Rev. Code § 12-1-2(a)(1)(A), J.A.65; Aspen Mun. Code § 13-98(a)(1), J.A.90. Other laws prohibit arbitrary discrimination more generally. For instance, Colorado law generally prohibits private employers from discriminating against employees

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the district court ruling that gay people are not entitled to suspect or quasi-suspect classification, Pet. App. C-14-19, they do not concede that the district court ruling on this issue was correct. A number of the plaintiffs' claims remain pending in the district court, including their claim that Amendment 2 violates the First Amendment.

[3] The State does not appeal from the Colorado Supreme Court's ruling that Amendment 2 does not serve any compelling state interest.

on the basis of any legal off-duty conduct. C.R.S. § 24-34-402.5.

The trial court found that gay people had suffered from a long history of discrimination. Pet. App. C-18; R.12:178-239; 15:707-08; Boswell aff. at ¶¶ 14-19.[4] The undisputed facts show that gay people in Colorado have experienced the same sort of discrimination,[5] including discrimination in the provision of basic government services like police protection.[6] Perceiving a need to remedy

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[4] During the decade after World War II, the United States government persecuted gay people as "moral perverts." R.12:204. In 1953, President Eisenhower issued an executive order requiring the discharge of all gay and lesbian employees from any type of federal employment; the rule also applied to companies that had federal contracts. R.12:204-05. Well into the 1970's, police departments arrested thousands of people for "disorderly conduct" because they were perceived to be gay or lesbian. R.12:191-204. More Americans harbor strong antipathy to gay people than to any other group in America, including African-Americans, Hispanics, Jews and undocumented aliens. University of Michigan Institute for Social Survey Research, R.15:562-63; 16:911-12. And gay people are subject to more hate-related violence than any other group in the nation. *See* Kevin T. Berrill, "Anti-Gay Violence and Victimization in the United States: An Overview," in *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* 19 (Gregory M. Herek and Kevin T. Berrill, eds., 1992).

[5] R.7:4-165; 8:42-64; 12:121,192-93,210-11; 15:707; 19:1350, 1362-63; Foster aff. at ¶¶ 3, 14; Pena aff. at ¶¶ 2,3,6; Durgin aff. at ¶¶ 7-10,14; Bennett aff. at ¶ 8; Damon aff. at ¶ 5; *see* Pl.Ex. 102 (City and County of Denver, Dep't of Safety, *Hate Crimes in 1991-1992*), R.16:447.

[6] The Denver Police Department persistently harassed gay people by arresting their political leaders and confiscating their newspapers; the Denver police also targeted gay people by arresting them on pretextual grounds, such as jaywalking. R.12:192-93. In 1973 the Department signed an agreement with the Colorado Gay Alliance to stop such governmental harassment. R.12:210-11. Plaintiff Angela Romero, a police officer, testified that she was transferred from the school resource program to patrol duty when her supervisor discovered that she had purchased research materials from a lesbian bookstore. Other officers refused to provide back-up protection for her after she returned to patrol duty. R.7:104-16,142.

such public and private discrimination, state and local governments in Colorado enacted various laws to forbid discrimination on the basis of sexual orientation by both government and private persons.

Most of these laws and policies prohibited discrimination by governmental actors such as police officers, judges and other governmental employees. These measures include:

> an Executive Order by the Governor prohibiting discrimination in state employment, No. D0035 (Dec. 10, 1990), J.A.22-23;
>
> Canon 3(a)(9) of the Code of Judicial Conduct prohibiting judicial prejudice or bias based on sexual orientation, J.A.30;
>
> Denver Police Department regulations prohibiting officers from discriminating against fellow officers, complainants, or violators on the basis of sexual orientation or from using derogatory language relating to sexual orientation during police radio transmissions, §§ 19-10(c), RR-122, RR-128, Dir. 91-13, J.A.57-59;
>
> the policies of Colorado State University, Metropolitan State College and the Boulder Valley School District prohibiting discrimination on the basis of sexual orientation, J.A.82-85;
>
> and ordinances or resolutions enacted by the cities of Boulder and Aurora, and the County of Boulder prohibiting discrimination on the basis of sexual orientation in local government employment, J.A.60-61,63-64,69,94.

In addition to prohibitions against governmental discrimination, state and local governments also prohibited private discrimination. These laws include:

> a state statute prohibiting discrimination on the basis of sexual orientation in insurance underwriting practices, C.R.S. § 10-3-1104, J.A.25;[7]
>
> Denver, Boulder, and Aspen ordinances prohibiting discrimination on the basis of sexual orientation in employment, housing and public accommodations, Denver Mun. Code art. IV, §§ 28-91 to -116 (1991); Boulder Rev. Code §§ 12-1-2 to -4 (1987); Aspen Mun. Code § 13-98, J.A.32-53,62-79,90-92;
>
> and Rule 1.2(f) of the Colorado Rules of Professional Conduct prohibiting lawyers from engaging in "conduct that exhibits or is intended to appeal to or engender bias against a person on account of that person's sexual orientation," J.A.31.

Because these laws prohibit discrimination on the basis of sexual orientation generally, all of these laws protect heterosexual as well as gay people from discrimination. R.8:38.

Prior to the enactment of Amendment 2, nothing prevented government or voters from repealing any of these anti-discrimination laws and policies. Similarly, nothing required them to adopt any additional such laws or policies. For example, the voters of Fort Collins and the city council in Colorado Springs had rejected proposed ordinances forbidding discrimination on the basis of sexual orientation. Pet. App. F-4; R.7:21-23; 19:1346; Pl.Ex. 116. A Colorado Civil Rights Commission proposal

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[7] The Colorado Insurance Code was amended in 1989 to deter insurance underwriting practices such as the refusal to write health or life insurance for men who live in certain residential areas identified by zip code, who are engaged in certain occupations, or who designate a non-related individual as an insurance beneficiary. R.8:142-44.

to add sexual orientation to the list of forbidden criteria for discrimination in the state's civil rights laws was not even introduced in the General Assembly. R.9:23.

B. Legislative History of Amendment 2.

Dissatisfied with the give and take of the normal political process affecting anti-discrimination laws and policies, Colorado for Family Values ("CFV") proposed Amendment 2 as a ballot initiative amending the state constitution. Amendment 2 differed fundamentally from previous efforts to repeal anti-discrimination measures: it altered the jurisdiction of all governmental entities in Colorado by barring all branches and all levels of government from protecting gay people from *any* form of public or private discrimination in *any* context. In CFV's words, the purpose of Amendment 2 was to "close the lid on the entire issue of [civil rights for gay people] here in Colorado." R.15:853, J.A.182. As the Colorado Supreme Court later determined, Amendment 2 "sought to deny" the right of gay people "to participate equally in the political process." 882 P.2d at 1349, Pet. App. B-22, Pet. App. D-24-27.

In the ensuing ballot campaign, CFV relied on two arguments to persuade voters to enact Amendment 2. First, CFV portrayed all gay men and lesbians as "morally depraved" persons who undermine "traditional family values and structures." Pl.Ex. 11 at 32-33, R.6:55; Pl.Ex. 12 at 55, R.6:56. CFV's campaign brochure asserted that gay people sexually molest children as part of "homosexuals' lifestyle." Df.Ex. W (lodged concurrently with Joint Appendix) at 2, R.8:117. CFV's campaign materials sent to pastors also emphasized Biblical passages as justification for discrimination against gay people. R.8:85. CFV asserted that "gay behavior" is what the Bible calls "sin," R.16:888, Pl.Ex. 12 at 113, and that homosexuality is "an abomination" to "the authority of God." R.16:1062-63.

Second, CFV argued that laws protecting gay people from discrimination provided them with "special rights"

not available to other Colorado residents. As an officer of CFV later conceded, the phrase "special rights" was a "meaningless term" designed as a campaign slogan rather than an accurate description of Amendment 2's legal effects. R.16:879, J.A.102.[8]

C. Scope and Meaning of Amendment 2.

Amendment 2's plain language prohibits "any . . . claim of discrimination" made pursuant to "any statute, regulation, ordinance or policy" whenever the discrimination for which the claimant seeks relief is based on "homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships."[9] This prohibition on remedies for discrimination is expressly unlimited. The amendment bars state and local government from prohibiting discrimination of any kind and in any context if it is based on a person's gay, lesbian or bisexual orientation – including government employment, the sale of insurance, or provision of governmental services like police protection, where government expressly prohibits arbitrary discrimination directed against other groups.

The briefs of the State and certain amici imply that Amendment 2 authorizes only discrimination by *private* actors such as private employers and landlords. *See, e.g.*, State Br. 7, Brief of Amicus Curiae Equal Rights, Not

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[8] The National Legal Foundation, an advisor to CFV, agreed that " 'No Special Privileges' [was] a good motto for the amendment's public campaign" but recommended that the phrase be removed from the text of Amendment 2 to maximize the scope of the ballot measure. R.8:78,86-88,113, J.A.102.

[9] The plaintiffs' brief uses the term "sexual orientation" to encompass Amendment 2's reference to "orientation, conduct, practices, or relationships." The Colorado Supreme Court determined that each listed characteristic "provides a potentially different way of identifying that class of persons who are gay, lesbian, or bisexual." 882 P.2d at 1349, Pet. App. B-22-23.

Special Rights, Inc., 7. This mischaracterizes Amendment 2's scope. As the Colorado Supreme Court noted, relying on the fact that Amendment 2 repeals the Governor's Executive Order, Amendment 2 nullifies all laws and policies that bar *governmental* discrimination against gay people. 854 P.2d at 1284-85, Pet. App. D-24-25.

The State also implies that the Colorado Supreme Court determined only that Amendment 2 repeals existing laws. State Br. 3, citing Pet. App. D-24. The State fails to point out that the next paragraph of the court's opinion declares,

> The "ultimate effect" of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures. In the absence of such a constitutional amendment, any governmental entity would be acting contrary to the state constitution by "adopting, enacting, or enforcing" any such measure.

854 P.2d at 1285, Pet. App. D-25.[10] The court observed that it "need not determine what broader application Amendment 2 might have" because its interpretation provided a "sufficient basis" for its conclusion that Amendment 2 is unconstitutional. 854 P.2d at 1284 n. 25 and 1285 n. 27, and Pet. App. D-24 n. 25 and D-25 n. 27.

The State also asserts that Amendment 2 only prohibits state and local governments from providing "special rights" to gay people. According to the State, after the enactment of Amendment 2 "[i]ndividuals would retain precisely the same rights under state and federal law that they had prior to the enactment of the special protections repealed by Amendment 2." State Br. 6. Of

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[10] This Court "must, of course, accept the State Court's view of the purpose of its own law. . . . " *U.S. Term Limits, Inc. v. Thornton*, 63 U.S.L.W. 4413, 4428 (May 22, 1995).

course, this is not true. Prior to Amendment 2 all people had the right at all levels of government to seek protection from arbitrary discrimination. But under Amendment 2, gay people – and they alone – have no such right. Furthermore, contrary to the State's assertions, there is nothing "special" about the legislation expressly forbidden by Amendment 2. Many state and local laws provide rights to members of numerous groups to be free from arbitrary, irrational or unfair discrimination. Amendment 2, however, precludes enforcement of such laws insofar, and only insofar, as they prohibit discrimination against gay people.[11]

For instance, state law regulates the insurance industry to prevent "unfair discrimination" against any insured on any basis. C.R.S. § 10-3-1104(1)(f). Amendment 2 nullifies this statute to the extent, and only to the extent, that it prohibits discrimination on the basis of gay, lesbian or bisexual orientation. Also, state law regulates public employment to prevent all arbitrary discrimination against state employees on any basis by government. *See, e.g.*, C.R.S. § 24-50-115 (regulating dismissal of civil servants). Amendment 2 prevents application of those regulations to cases – and only to cases – of discrimination on the basis of gay, lesbian or bisexual orientation even where such discrimination is, in fact, arbitrary.

More generally, Amendment 2 bars claims made under state and local laws regardless of whether such laws mention sexual orientation as a forbidden criterion for discrimination. This is because Amendment 2 bans "any . . . claim" seeking relief from "discrimination"

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[11] The enactments that Amendment 2 repeals all refer to discrimination on the basis of "sexual orientation" or "sexual preference." Because Amendment 2 addresses only "homosexual, lesbian or bisexual orientation," the enactments remain valid to the extent that they prohibit discrimination on the basis of *heterosexual* orientation.

based on gay, lesbian or bisexual orientation.[12] For example, Colorado law prohibits as a "discriminatory or unfair employment practice" a private employer's termination of "any employee due to that employee's engaging in any lawful activity off the premises of the employer during non-working hours." C.R.S. § 24-34-402.5. Prior to the enactment of Amendment 2, all employees (including gay employees) could obtain relief under § 24-34-402.5 from an employer's discriminatory termination based on their legal off-duty conduct.

Nevertheless, Amendment 2 prevents gay people – and only gay people – from bringing "any . . . claim of discrimination" under § 24-34-402.5 for relief from discrimination based on "homosexual, lesbian, or bisexual orientation, conduct, practices or relationships."[13] Thus,

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[12] As recently noted, the use of the word "any" in similar language in the federal Fair Housing Act renders it "difficult to imagine what broader terms Congress could have used to signify the categories or kinds of relevant government restrictions that are exempt from the F.H.A." *City of Edmonds v. Oxford House, Inc.*, 63 U.S.L.W. 4402, 4406 (May 15, 1995) (Thomas, J., dissenting).

[13] Section 24-34-402.5 does not expressly create any "claim of discrimination" based on "homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships." However, *no* state or local law in Colorado has ever made gay, lesbian or bisexual orientation or conduct a forbidden criterion *as such*: such laws mention only the more general criterion of "sexual orientation." *See* n. 11 *supra*. If Amendment 2 barred claims of discrimination only when brought pursuant to laws explicitly prohibiting discrimination on the basis of the characteristics described in the amendment, Amendment 2 would not preclude laws that the Colorado Supreme Court explicitly found to be precluded. 854 P.2d at 1284-85, Pet. App. D-24-25.

Section 24-34-402.5 forbids discrimination on the basis of a broad category (i.e., legal off-duty conduct) that subsumes a specific type of discrimination constitutionally authorized by Amendment 2 (i.e., discrimination based on "homosexual, lesbian, or bisexual . . . conduct"). In this respect, the statute is

far from preventing gay people from enjoying "special rights," Amendment 2 deprives them alone of *any* right to be free from discrimination on the basis of legal off-duty activities, a right that is extended to all other persons in Colorado.

In sum, Amendment 2 prohibits gay people from seeking or obtaining basic protections from discrimination that state and local laws routinely provide to all other persons in Colorado. And Amendment 2 extends that prohibition as far as Colorado's jurisdiction reaches – to every level and every branch of government. Accordingly, contrary to the State's argument, State Br. 34, the "breathtaking" aspect of this case is not the "sweep" or "devastating" consequences of the Colorado Supreme Court's decision, but rather of Amendment 2 itself. The amendment is unprecedented in its total elimination not only of every state-law barrier to discrimination against a targeted minority group, but also of every opportunity that group might otherwise have had to seek redress from the discrimination.

SUMMARY OF ARGUMENT

Amendment 2 singles out one group of people and forbids state or local government from taking any action to protect that group from *any* claim of discrimination based on sexual orientation. The amendment forbids such protection without qualification or limit, regardless of circumstances and regardless of whether a governmental actor or private party discriminates. The question before this Court is whether such a selective and sweeping restriction of access to protection for only one group of people denies those people equal protection of the laws. Plaintiffs submit that it does for two reasons.

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identical to laws prohibiting discrimination on the basis of "sexual orientation" and is restricted by Amendment 2 for the same reason and to the same extent. *See* n. 11 *supra*.

First, Amendment 2 deprives them of a right to participate equally in the political process and, therefore, must be subjected to strict scrutiny – a scrutiny the state concedes the amendment cannot meet. Second, even under this Court's most lenient level of equal protection scrutiny, Amendment 2 lacks the necessary rational relationship to a legitimate state purpose.[14]

This Court has held that the Fourteenth Amendment prohibits states from restructuring the political process to discriminate deliberately and substantially against particular groups. By gerrymandering the jurisdiction of all political institutions in Colorado to exclude anti-discrimination laws and policies only to the extent that they protect against anti-gay discrimination, Amendment 2 denies those people an equal opportunity for political participation. Although gay people can still cast a ballot, the value of their ballot has been substantially and unequally diminished: they alone are barred from even an opportunity to seek a type of protection available to all other people in Colorado – an opportunity to seek protection from discrimination.

The State contends that it may restructure its political process to single out a specific group for such discriminatory treatment, so long as it does not burden a "suspect class." However, this Court has held that the Fourteenth Amendment guarantees a right to equal participation in the political process for members of *all* groups, not just suspect classes. This Court has also held that normal judicial deference is inappropriate whenever government

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[14] In addition to the arguments that follow, the plaintiffs refer to and endorse the arguments set forth in the amicus brief filed by Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, and Kathleen M. Sullivan. The amici argue that Amendment 2 constitutes a per se deprivation of equal protection because it strips only one group of people of all eligibility for any protection from an entire category of wrongful mistreatment – the mistreatment of discrimination.

bars members of one group from equal participation in the political process by influencing elected representatives. This is because the inequality infects the political process itself, and the Court cannot rely on the democratic process alone to redress the inequality.

The State also contends that the decision below will have "devastating" consequences by subjecting numerous state and federal laws to heightened scrutiny. However, the principle identified in the decision below applies only where state laws intentionally deprive one group of the same opportunity to seek a type of government action that everyone else is free to seek, and does so in a way that substantially degrades that group's influence in the political process. Amendment 2 is unique in having such a discriminatory purpose and effect. Indeed, the State cannot cite a single other constitutional provision which, like Amendment 2, targets one group of people and excludes this group alone from obtaining anti-discrimination protection from ordinary legislative, administrative and judicial forums to which everyone else may freely appeal.

Even if this Court declines to apply heightened scrutiny to Amendment 2, it should conclude that the amendment lacks a rational relationship to any legitimate purpose and, therefore, is invalid under even the most lenient level of judicial scrutiny. Amendment 2 is unprecedented in that it insulates against legal control or review all instances of governmental and private discrimination based on a particular characteristic, regardless of context or circumstances. Such a blanket foreclosure of responsiveness to one group's interests is rationally related to one purpose alone – the expression of antipathy toward gay people. That is not a legitimate purpose, and it cannot save Amendment 2 from the requirements of the Equal Protection Clause.

The State nevertheless offers several purposes allegedly served by Amendment 2. None are rationally

served by Amendment 2 for two reasons. First, none explain why Amendment 2 singles out gay people alone to be stripped of protection from discrimination. Second, none can explain why Amendment 2 authorizes discrimination on the basis of gay, lesbian or bisexual orientation in *every* context. Moreover, the legislative history confirms that the State's asserted purposes are mere pretext and that in fact Amendment 2 serves only the purpose of expressing hostility toward gay people.

In the end, the State can provide no plausible reason to deprive gay people and only gay people of all opportunity to seek protection from discrimination on the basis of sexual orientation, while leaving all other people fully eligible to seek such protection. The question in this case is whether state law may selectively impose such a sweeping deprivation of protection from discrimination on members of *any* group consistent with the Fourteenth Amendment's guarantee of equal protection of the laws. Whether tested under heightened scrutiny or rational basis review, such an unequal deprivation violates the Fourteenth Amendment.

ARGUMENT

I. A STATE LAW THAT SINGLES OUT GAY PEOPLE AND INTENTIONALLY DENIES THEM ALL EFFECTIVE OPPORTUNITY TO SEEK RELIEF FROM DISCRIMINATION THROUGH THE POLITICAL PROCESS REQUIRES HEIGHTENED SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A. The Colorado Supreme Court Correctly Identified the Principles Triggering Heightened Scrutiny.

The decision below rests squarely on this Court's well-established jurisprudence protecting the right to

equal, meaningful participation in the political process.[15] This jurisprudence does not merely guarantee an equal right to cast an equally weighted ballot. Rather, the Fourteenth Amendment prohibits all efforts, both obvious and subtle, to deprive members of particular groups of fair and equal representation.[16]

1. The Fourteenth Amendment Prohibits States from Gerrymandering Governmental Structure for the Purpose of Depriving Members of Targeted Groups of Equal Participation in the Political Process.

As the Colorado Supreme Court noted, this Court has consistently applied a heightened standard of review to state laws when such laws deprive members of particular groups of equal participation in the day-to-day political process. For instance, when state laws disenfranchise a particular group, the Court applies strict judicial scrutiny. *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969). Similarly, the Court applies strict scrutiny to state laws that place voters in unequally populated districts and prevent them from casting equally weighted votes. *Reynolds v. Sims*, 377 U.S. 533 (1964). Likewise, the Court applies such scrutiny to laws that gerrymander the boundaries of even equipopulous districts to ensure the defeat of a political group. *Davis v. Bandemer*, 478 U.S. 109 (1986); *see also Republican Party of North Carolina v. Martin*, 980 F.2d 943,

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[15] The political process includes the legislative, executive, and other more informal processes by which government decisions of all sorts, including decisions to forbid discrimination, are made.

[16] *See also* the explanation of the fundamental right to equal participation in the political process in the Amici Curiae Brief filed by the Colorado Bar Association, et al., and numerous other state and local bar associations.

955-58 (CA4 1992), *cert. denied* 114 S.Ct. 93 (1993) (North Carolina's allocation of decision-making authority to state-wide constituency held to burden Republican Party's right to equal political participation by "diluting" its political influence at local level). The Court also strictly scrutinizes laws that deny an equal opportunity for political participation by imposing ballot access requirements that single out small parties or unpopular political groups for exclusion. *See generally Norman v. Reed*, 502 U.S. 279 (1992); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979).

In all of these lines of authority, the Court has departed from the deferential standard that normally characterizes judicial review of state legislation. Viewing these cases as unconnected to any larger principle, the State does not and cannot explain this lack of deference. But, contrary to the State's view, these decisions are animated by a single common concern – a recognition of the special judicial duty to ensure to all persons regardless of their social identity equal access to the day-to-day political process.

As the Court has made clear, judicial review of state legislation normally operates under the assumption that "even improvident decisions will be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *see generally* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 144 (1883). However, the premise underlying such deference is an impartial "democratic process." *See Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 467-70 (1982); *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4 (1938); James Madison, *Federalist No. 51*, in *The Federalist Papers* (Kramnick ed. 1987); John Hart Ely, *Democracy and Distrust* 73-104 (1980). Accordingly, when the state discriminates against any

particular group in the regular processes by which voters' preferences are translated into policy choices, the Court no longer can rely on the democratic process alone to prevent arbitrary discrimination: since, by definition, such discrimination restricts the voices that can be heard in the democratic process, it "is unlikely to be soon rectified by legislative means." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *Crawford v. Bd. of Educ.*, 458 U.S. 527, 546 (1982) (Blackmun, J., concurring) ("distortions of the political process have special implications for attempts to achieve equal protection of the laws").

The Court's steadfast protection of the equal right to cast a ballot is not an end in itself but rather a means to protect a larger end – the "right to full and effective *participation in the political process* of [the] State's legislative bodies." *Reynolds*, 377 U.S. at 565 (emphasis added).[17] After all, equal voting rights are important primarily because they give individuals the opportunity to elect representatives who will enact and enforce laws that benefit or are favored by those individuals. As a result, even if a given state law does not directly deny the formal right to cast a ballot for officials elected from equipopulous districts, it can still unconstitutionally burden the ultimate right to equal *representation* by "consistently degrad[ing] . . . a group of voters' influence on the political process as a whole." *Davis*, 478 U.S. at 132.

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[17] *See also Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 693 (1989) ("'each and every citizen has an inalienable right to full and effective participation in the political processes' of the legislative bodies of the Nation, State, or locality as the case may be") (quoting *Reynolds*, 377 U.S. at 565); *Davis v. Bandemer*, 478 U.S. at 133 (plurality opinion) (Fourteenth Amendment is violated when there has been an "effective denial to a minority of voters of a fair chance to influence the political process"); Laurence H. Tribe, *American Constitutional Law* 1062-1153 (2d ed. 1988).

As the Colorado Supreme Court noted, the application of these general principles to Amendment 2 is best illustrated by this Court's decision in *Hunter v. Erickson*, 393 U.S. 385 (1969). 854 P.2d at 1279, Pet. App. D-14. In *Hunter*, the voters of Akron, Ohio amended the city charter to require that any fair housing ordinance enacted by the city council be approved by the electorate in a referendum. This Court held that Akron's charter amendment was invalid because it singled out legislation protecting only racial and religious minorities. The Court likened the charter amendment to vote dilution, stating that the voters of Akron could

> no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size. *Cf. Reynolds v. Sims*, 377 U.S. 533 (1964); *Avery v. Midland County*, 390 U.S. 474 (1968).

Hunter, 393 U.S. at 393.

As this Court recognized, the decision in *Hunter* emerges directly out of this Court's jurisprudence in *Reynolds* and *Avery* concerning dilution of the right to vote. Together, these cases recognize that in order to have equal access to the political process, there must be equality in two respects: one must have a vote equal to the votes of other persons, and one's representatives must not be uniquely incapacitated from responding to one's vote.

Group-based discrimination in the allocation of the ballot undermines the elected official's incentives to be responsive. But group-based discrimination in the definition of the elected official's powers has a similar effect: it *requires* the official to be selectively unresponsive. In either case, laws like the charter amendment in *Hunter* effectively prevent members of the burdened group from enjoying the same access to the give and take of ordinary

government that everyone else enjoys. *See Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960).[18]

Justice Harlan's concurrence in *Hunter* highlights the Court's special duty to ensure that structural provisions of state law are even-handed and non-discriminatory. As Justice Harlan explained, the Fourteenth Amendment requires that "laws which define the powers of political institutions" be based on "neutral principles." 393 U.S. at 393-94. In determining whether such laws are based on "neutral principles," the Court has asked whether the government structure they create is "designed with the *aim* of providing a just framework within which the diverse political groups in our society may fairly compete and [is] not enacted with the *purpose* of assisting one particular group in its struggle with its political opponents." *Hunter*, 393 U.S. at 393 (Harlan, J., concurring) (emphasis added).

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[18] In *Gomillion*, this Court found that the Alabama legislature's redrawing of the boundaries of the City of Tuskegee to exclude African-American voters from the city's limits abridged their right to vote under the Fifteenth Amendment. Those voters still had the right to cast a ballot in county elections but could not vote for officers of the city from which they had been excluded. *Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring). Thus, Alabama violated the African-Americans' right to vote by changing the powers of their elected representatives. Although they still could cast a ballot, the effectiveness of that ballot was diminished because the county commissioners of Macon County lacked the jurisdiction to address municipal issues of chief interest to them. *Gomillion*, 364 U.S. at 341-43. *Gomillion* addresses a claim of racial discrimination in voting under the Fifteenth Amendment, but the Court has elsewhere expressly noted that the principles developed in Fifteenth Amendment cases apply to Fourteenth Amendment claims by non-racial political groups. *Davis*, 478 U.S. at 131 n. 12; *Karcher v. Daggett*, 462 U.S. 725, 749 (1983) (Stevens, J., concurring) (noting that Fourteenth Amendment's "protection against vote dilution cannot be confined to racial groups").

Thus, bicameralism, the executive veto, and supermajority requirements for constitutional amendment are all "founded on neutral principles" even though they "may on occasion make it more difficult for minorities to achieve favorable legislation" because their purpose is not to exclude "one particular group" from access to the normal political process. *Hunter*, 393 U.S. at 394 (Harlan, J., concurring). By contrast, Akron's charter amendment was not based on such "neutral principles" because it "ha[d] the clear *purpose* of making it more difficult for *certain* racial and religious minorities to achieve legislation that is in their interest." *Id.* at 395 (emphasis added). By singling out a category of legislation only to the extent that such legislation protected certain groups, the Akron charter deprived the members of the burdened groups of the equal protection of the laws.

Justice Harlan's concurrence emphasizes two essential aspects of *Hunter*. First, the Fourteenth Amendment is concerned with protecting neutrality or impartiality in the *structure* of government decision-making. This concern does not require the Court to intervene to review the adoption or repeal of specific legislation. Under *Hunter*, the voters of any jurisdiction remain completely free to adopt or repeal any specific law. 393 U.S. at 395 (Harlan, J., concurring) ("If the prospect of fair housing legislation really arouses passionate opposition, the voters will have the final say.").

Second, *Hunter* requires only that the powers of government be defined impartially, not that any particular issue be delegated to any particular level of government. States remain free to exclude a category of governmental action, so long as the category is excluded equally for all groups. Such even-handed exclusion does not deprive any person of equal protection because "the political majority may *generally* restructure the political process to place obstacles in the path of *everyone* seeking to secure

the benefits of governmental action." *Washington v. Seattle School District*, 458 U.S. at 470 (emphasis added).

Gordon v. Lance, 403 U.S. 1 (1971), illustrates the distinction between exclusion of issues and exclusion of groups. In *Gordon*, this Court upheld West Virginia's mandatory referendum requirement for bonded indebtedness. Rejecting the argument that this provision was inconsistent with *Hunter*, the Court stated that West Virginia's law did not fence out any sector of the population because the referendum requirement "applied equally to all bond issues" and did not single out the issue of bonded indebtedness only to the extent that it benefitted some "independently identifiable group." *Gordon*, 403 U.S. at 5.

As *Gordon* indicates, a group is "independently identifiable" if the challenged law identifies the group in its text, singling out the group based on personal traits like age, disability, sexual orientation, or race, that are unrelated to the issue addressed by the law. Such law deprives persons of equal access to the political process if it prevents only one such group from being the beneficiary of a category of government action *that all other persons may otherwise obtain*. By contrast, if a category of government action is excluded across the board, without regard to the group protected by the action, then no one is denied an *equal* opportunity to participate in the political process because everyone is *equally* barred from obtaining the excluded category of government action.

Of course, even structural provisions that impartially exclude issues without regard to independently identifiable groups nevertheless will prevent some laws from being enacted, to the disappointment of the supporters of such laws. But, provided the category of government action is excluded across the board in a non-discriminatory manner, such supporters are not deprived of equal participation in the political process because they are not deprived of access to a category of government action

that others can obtain. *Gordon*, 403 U.S. at 5-6; *see also James v. Valtierra*, 402 U.S. 137, 142 (1971) (referendum requirement for public housing upheld that burdened "persons desiring public housing"). So long as a barrier to political participation is "non-discriminatory," such a barrier is not subject to heightened scrutiny under the Fourteenth Amendment. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (impartial ban on all write-in candidacies not subject to heightened scrutiny because it is "non-discriminatory").

In sum, judicial deference to state law is inappropriate when such law deprives an independently identifiable group of equal participation in the process by which democratic decision-making occurs. Laws defining the jurisdiction of elected officials are obviously part of this process, as *Hunter* and *Gordon* make clear. And when such laws exclude policies based on the identity of the group that is protected by such policies, then the members of the burdened group are deprived of equal representation. For the reasons stated, such deprivation warrants heightened scrutiny to effectuate the guarantees of the Equal Protection Clause.

2. The Fourteenth Amendment Does Not Afford States Unlimited Power to Discriminate In the Structure of Government Simply Because the Discrimination Targets Classes Not Deemed Suspect.

Despite *Hunter*'s plain statement to the contrary, the State contends that the Fourteenth Amendment places no restraint on the degree to which a state may restructure its government to deprive only one group of political influence, provided that the group has not been deemed a suspect class. To support this assertion, the State relies on three arguments. First, the State contends that "bedrock principles of federalism" afford it virtually unlimited authority to reallocate power among its subdivisions, and to do so discriminatorily if it chooses. State Br. 15-16.

Second, the State asserts that *Hunter* is inapplicable to race-neutral laws. State Br. 19-24. Finally, the State contends that any recognition of a right to be free of governmental structures that single out particular constituencies and subject them alone to special law-making processes would lead to the "devastating" and "sweeping" consequence of applying strict scrutiny to all federal and state legislation. State Br. 34-38. All three contentions are without merit.

a. State Allocations of Governmental Power Are Not Exempt from the Fourteenth Amendment.

Citing *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), the State contends that states have virtually unlimited discretion to reallocate power among their political subdivisions, regardless of whether the reallocations deprive a group of an equal opportunity for political participation. State Br. 15-16. According to the State, such unlimited discretion is required by "bedrock principles of Federalism." *Id.*

However, as this Court ruled in *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960), *Hunter v. City of Pittsburgh* held only that the states are free to allocate power among subdivisions provided the reallocation does not otherwise burden a federally protected right. *Gomillion* expressly held that such reallocations of power could work an unconstitutional "impairment of voting rights" that could not be insulated from judicial review merely by being "cloaked in the garb of the re-alignment of political subdivisions." *Id.* at 345. Similarly, as this Court stated in both *Hunter*, 393 U.S. at 392, and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 476 (1982), the fact that a state may "distribute legislative power

as it desires . . . furnish[es] no justification for a legislative structure which otherwise would violate the Fourteenth Amendment."[19]

b. The Right to Equal Political Access Belongs to All People, Not Just to Members of Suspect Classes.

The State contends that *Hunter* and *Washington v. Seattle School District* hold only that the Equal Protection Clause forbids the political process from being restructured to "place unusual burdens on . . . racial groups" or other suspect classifications. State Br. 23. To support this contention, the State cites *James v. Valtierra*, 402 U.S. 137 (1971).

The State misreads this Court's cases and illogically supposes that the right to equal political access belongs only to certain people or groups.[20] But of course it does not. As the Court held in *Hunter*, "the State may no more disadvantage *any* particular group by making it more difficult to enact legislation in its behalf than it may dilute *any* person's vote or give *any* group a smaller representation than another of comparable size." 393 U.S.

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[19] The State relies on *Crawford v. Bd. of Educ.*, 458 U.S. 527 (1982), to support the constitutionality of Amendment 2. State Br. 32-33. However, unlike Amendment 2, the constitutional provision at issue in *Crawford* merely barred the state judiciary from providing one remedy for school desegregation. As Justice Blackmun noted in his concurrence, such a limited barrier to one judicial remedy does not "work[ ] a structural change to the political process" or deny equal access to "the process of self-government" because the political branches of government remain free to protect all groups from discrimination. *Crawford*, 458 U.S. at 546.

[20] Equal protection is a personal right and extends identically to all individuals rather than protecting particular classes or groups. *Adarand Constructors, Inc. v. Pena*, 63 U.S.L.W. 4523, 4529, 4532 (June 12, 1995).

at 393 (emphasis added). Twice the Court explained that the amendment in *Hunter* was constitutionally offensive because it disadvantaged one particular group by making it more difficult for its members to participate in the political process. *Id.* at 391, 393. In one instance, the Court referred to the amendment before it as a denial of the right to vote on an equal basis; and, in the other, the Court equated procedures that make it more difficult to enact protective legislation with dilution of voting power. *Id.* In both instances, the Court cited *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Avery v. Midland County*, 390 U.S. 474 (1968), two voting rights malapportionment cases that did not involve suspect classifications. *See* Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 Harv. L. Rev. 1905, 1917 (1993) (explaining similarity between city charter amendment addressed in *Hunter* and constitutional amendments like Amendment 2).

The State dismisses this discussion of vote dilution in *Hunter* in a footnote, ignoring *Hunter*'s reliance on *Avery* and *Reynolds*. State Br. 21 n. 11. The State also ignores Justice Harlan's concurring opinion that sets out a *general* "constitutional approach" to "state statutes which structure the internal governmental process." *Hunter*, 393 U.S. at 393. Justice Harlan's opinion requires that such government structure be "founded on neutral principles," not just on *race*-neutral principles. 393 U.S. at 394.

Likewise, the State ignores the fact that in *Gordon*, 403 U.S. at 5, the Court grouped *Hunter* with *Gomillion*, *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969), and *Carrington v. Rash*, 380 U.S. 89 (1965), all cases that concern the right to vote. If mandatory referenda were suspect only when they disadvantaged "suspect classes," *Gordon* would have cited *Hunter* for that proposition and disposed of the case summarily, because the referendum in *Gordon* did not involve a suspect classification. Instead, *Gordon* found that the mandatory referendum requirement was constitutional not because it was race-neutral,

but because it did not "fence out" *any* independently identifiable group from the political process. *Gordon*, 403 U.S. at 5.

Ultimately, the State's interpretation of this Court's precedents is based upon the following logic: because *Hunter* and *Washington v. Seattle School District* involved state or local laws that discriminated on the basis of race, these cases cannot involve discrimination that burdens a fundamental right of political participation. State Br. 21 n. 11 (*Hunter* rests exclusively on unconstitutionality of racial discrimination because of "the Court's overall analysis of race in that opinion"). The State's reasoning not only distorts what the Court said in those cases, but also is illogical. Racial discrimination and unconstitutional exclusion from equal access to the political process are not mutually exclusive; indeed, the Fifteenth Amendment requires proof of both. Of course, *Hunter* and *Washington v. Seattle School District*, like *Gomillion*, involved racial discrimination. But they did not turn on that fact alone; rather, they also rested on the ground that burdening the political participation of "any particular group" through "non-neutral[ ]" structuring of government is unconstitutional. *Washington v. Seattle School District*, 458 U.S. at 468, 470, 476, 477 n. 19; *Hunter*, 393 U.S. at 393.

In the end, the State cannot explain away the numerous cases in which this Court has applied heightened scrutiny to state action that burdened equal access to the political process but did *not* involve suspect classes. Nor can the State offer any principled basis for treating the right of equal access as being less important for some groups than others. In fact, the State can cite only one authority for the proposition that *Hunter* and *Washington v. Seattle School District* rest exclusively on the unconstitutionality of racial discrimination – this Court's decision in *James v. Valtierra*, 402 U.S. 137 (1971). However, the State reads too much into *James*.

The plaintiffs in *James* argued for heightened scrutiny on the ground that California's mandatory referendum provision for public housing discriminated either on the basis of race or relative lack of income. 402 U.S. at 141, 144-45. In addition to denying those claims, the Court considered and rejected the view that any measure which sets up a different process for adopting legislation on a particular issue violates equal protection. 402 U.S. at 142. The vice of Amendment 2, however, is not that it creates special processes for laws on certain issues, but rather that it creates a special process for laws because they protect certain people. The argument that the plaintiffs make here was not made by the parties in *James*, and the Court did not rule on it.[21]

The State is correct that this Court's prior decisions striking down state laws similar to Amendment 2 all involved unconstitutional racial discrimination. But the State is wrong to contend that it is free to deprive members of any group of equal access to the political process so long as the group has not been determined to be a suspect class. Such a result is illogical, inconsistent with the Court's cases, and completely at odds with the basic principle justifying such heightened scrutiny: that such scrutiny is required in cases where unequal treatment of disfavored persons cannot be expected to be corrected through the ordinary political process because the inequality consists of precluding those persons from participating in that process itself.

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[21] As the Court pointed out in *Gordon*, 403 U.S. 1 (1971), a few weeks after *James*, a provision can only be said to take persons out of the process as opposed to taking issues off the table if it can be said to discriminate against a class that it identifies "independent" of the group's preferences regarding the subject it addresses. 403 U.S. at 5. By this standard, the law in *James*, which the Court found targeted only "persons desiring public housing," 402 U.S. at 142, did not target any independently identifiable group.

c. Heightened Scrutiny is Required Only Where the Discriminatory Exclusion from the Political Process Is Intentional and the Effects of the Exclusion Are Substantial.

The State contends that the Fourteenth Amendment cannot prohibit state constitutional provisions that target the interests of particular groups because any such prohibition will have "sweeping" and "devastating" consequences. State Br. 34. According to the State, the principle of impartiality in government structure recognized in the decision below would require that heightened judicial scrutiny be applied to all "routine federal and state legislation." *Id.* This is not so.

The State and amici exaggerate the reach of the decision below because they ignore the fundamental limit on the decision contained in the jurisprudence on which it is based. As explained in *Gordon* and in Justice Harlan's concurrence in *Hunter*, the Fourteenth Amendment bars only *discriminatory* laws that target particular groups. A law does not deprive anyone of *equal* protection unless it treats persons *unequally*, by forbidding laws from being enacted or applied for the benefit of some groups while allowing the same laws to be enacted and applied for the benefit of other groups. *Washington v. Seattle School District*, 458 U.S. at 474 n. 17, 480 n. 23. Therefore, if constitutional provisions are "grounded in neutral principles" and exclude issues across the board in an impartial manner, then such provisions are unaffected by the Fourteenth Amendment.

Such a doctrine concerning the gerrymandering of governmental jurisdiction is analogous to this Court's application of the Fourteenth Amendment to the gerrymandering of electoral districts or to ballot access regulations. Every arrangement of electoral districts and every ballot access regulation burdens some group of voters and candidates who would have been more successful

under a different scheme. However, such arrangements of electoral districts do not violate the Fourteenth Amendment unless they single out some political group in a discriminatory manner. *See Johnson v. De Grandy*, 114 S.Ct. 2647, 2658 (1994) (districting plan does not dilute minority's vote if it provides "equal political opportunity" even if minority voters would be more successful under a different scheme); *Davis v. Bandemer*, 478 U.S. at 131; *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (heightened scrutiny does not apply if "a state election law imposes only 'reasonable, *nondiscriminatory* restrictions' upon the First and Fourteenth Amendment rights of voters") (emphasis added).

In determining whether a particular state law discriminates against a particular group in its arrangement of the political process, it is necessary to examine both the purpose and the effect of the provision. *Davis v. Bandemer*, 478 U.S. at 127. If the provision simply has a disparate impact on the efforts of one political group and does not facially or deliberately burden that group, then it is not unconstitutionally discriminatory under the Fourteenth Amendment. *See, e.g., Davis v. Bandemer*, 478 U.S. at 127, 134, 142; *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Washington v. Davis*, 426 U.S. 229 (1976); *Hunter*, 393 U.S. at 394-95 (Harlan, J., concurring). Likewise, unless the discriminatory effects of a challenged law are substantial, it cannot be said to unconstitutionally burden a particular group. *See, e.g., Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728 (1973) (where water district has "disproportionate effect on landowners, state can deny non-landowners ballot for district's board"); *Ball v. James*, 451 U.S. 355, 371 (1981) (same); *Davis v. Bandemer*, 478 U.S. at 132 (to violate the Fourteenth Amendment, gerrymandering must "consistently degrade . . . a group of voters' influence over the political process as a whole").

These two well-established requirements of discriminatory purpose and substantial discriminatory effect eliminate the State's parade of horribles that allegedly proceeds from the decision below. For instance, the State and amici complain that "[a] vast array of federal tax, regulatory, and social legislation affects groups that are 'independently identifiable' based upon income, occupation, residence, health, age, or any number of other factors." State Br. 36; *see also* Brief Amicus Curiae of Equal Rights, Not Special Rights, Inc., 15 (innumerable constitutional provisions might "particularly affect" identifiable group).

This statement is true but irrelevant. The decision below does not apply to constitutional provisions that merely "affect" some identifiable group by imposing some disparate impact on the group. Rather, the decision below, like *Hunter*, applies only to provisions that explicitly or purposefully discriminate against a group. For example, a generally applicable restriction on bonded indebtedness (like the one in *Gordon*) may have a disparate impact on the elderly, who may depend disproportionately on public facilities. However, such a generally applicable restriction would not be subject to strict scrutiny under the decision below merely because it has a discriminatory impact.

The State and amici offer several instances of constitutional provisions that bar specific types of governmental action without regard to the beneficiaries of such action. For instance, they note that Colorado has enacted term limits for long-term incumbent government officials. State Br. 37. Contrary to the State's suggestion, however, term limits are the sort of neutral principle of government approved by Justice Harlan in his concurrence in *Hunter*.[22] The Colorado term limit does not arbitrarily

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[22] The Court adopted Justice Harlan's analysis in *Washington v. Seattle School District*, 458 U.S. at 483-84.

single out only one political group (e.g., representatives of agrarian areas or Republicans or elderly representatives) and impose term limits only on the incumbents who are members of such a group, leaving similarly situated incumbents unburdened.

The State misunderstands the decision below. The State's parade of horribles is populated by groups that it can only describe by views on or a desire to engage in activities that some state constitutions ban government from regulating. Some of these groups, the State insists, are in some way "independently identifiable." But the decision below does not apply whenever one can "identify" a group somehow disadvantaged by a limit on government power. This will almost always be possible. *See James*, 402 U.S. at 142 (group singled out was "persons desiring public housing").

Rather, the relevant question is whether *the state constitutional provision itself* identifies some group with some personal trait that is independent of the issue that the provision addresses, and gives to this group different access to the political process as to that issue. While none of the State's examples so identify and burden any group, this is precisely what Amendment 2 does.

B. The Colorado Supreme Court Correctly Determined that the Extraordinarily Discriminatory Circumstances of this Case Required Heightened Scrutiny.

The text, the legislative history, and the controlling determinations of the Colorado Supreme Court indicate that Amendment 2 is a deliberate effort to render political participation by gay people ineffective by making all levels and branches of government incapable of affording any protection from discrimination based on gay, lesbian, or bisexual orientation. Moreover, Amendment 2 has a substantial discriminatory effect on the access of gay people to the ordinary channels of political action. Under

even the most stringent application of the Court's precedents, these circumstances require that Amendment 2 be subjected to heightened scrutiny.

1. Amendment 2 Intentionally Excludes Only Gay People from Equal Opportunity to Participate in the Political Process.

There can be no question that the plain language of Amendment 2 specifically targets gay people: Amendment 2 deprives persons of any remedy for discrimination only to the extent that government or others discriminate on "the basis of" "homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships."[23] Thus, Amendment 2 specifically bars only gay people from seeking a basic kind of "protection of the laws" that any other group is free to seek and obtain. Amendment 2 is the antithesis of a "neutral principle" described by Justice Harlan in *Hunter*.

In addition to Amendment 2's facially discriminatory application to gay people alone, the record of this case also shows that Amendment 2 was intended to render ineffective only gay persons' political efforts to seek protection against public and private discrimination. The State has candidly conceded that the purpose of Amendment 2 is to block efforts by gay voters to obtain protection from discrimination – "simply [to] close the lid on

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[23] The plaintiffs disagree with the Sixth Circuit's ruling in *Equality Foundation v. City of Cincinnati*, 54 F.3d 261 (CA6 1995), for a number of reasons. The fallacies in the Sixth Circuit's approach to rational basis review are detailed in Part II, *infra*. The court's determination that gay people cannot comprise an identifiable group because sexual orientation is not a characteristic visible "on sight," *id.* at 267, ignores numerous federal, state and local civil rights laws that prohibit discrimination based on characteristics not physically apparent such as religion, marital status, veteran's status and some forms of disability.

the entire issue of [civil rights for gay people] here in Colorado." R.15:853, J.A.182.[24] This is dispositively confirmed by the determination of the Colorado Supreme Court: Amendment 2 "sought to deny [gay people's] right to participate equally in the political process." 882 P.2d at 1349, Pet. App. B-22.

2. The Burden on Gay People Is Devastating in that Amendment 2 Bans Them from Seeking Any Relief from Any Level of Government for Any Claim of Discrimination Against Them.

The discrimination authorized by Amendment 2 is astonishingly broad. Amendment 2 immunizes from all government remedy a sweeping, undefined right to discriminate on the basis of gay, lesbian, or bisexual orientation in all contexts and circumstances. Under Amendment 2, all efforts by government to protect gay people from discrimination are swept away: police regulations; state university non-discrimination policies; "just cause" safeguards for state employees; the state bar's canons of conduct for lawyers; state regulations of the insurance industry; and a multitude of other "statutes, regulations, ordinances, and policies" are all barred to the extent – and only to the extent – that they prohibit discrimination based on "homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships." Amendment 2 insures that such policies and regulations can no longer provide any "claim of discrimination" or "protected status" against a multitude of even government actors. From the police officer who refuses to patrol

[24] The State's expert witness went further, stating that Amendment 2 served the purpose of discouraging private persons from even manifesting public support for the idea that homosexuality is a legitimate type of sexual orientation. Finnis aff. at ¶¶ 16, 17; R.18:1343.

gay neighborhoods or provide backup assistance to lesbian police officers like plaintiff Angela Romero, to the judge who decides cases based on animus toward lesbians and gay men,[25] even state actors who irrationally and maliciously discriminate based on sexual orientation are immune from state legislative, executive, administrative, or judicial remedy.

These are extraordinary and unprecedented effects. It cannot seriously be denied that excluding one group from an equal opportunity to obtain protection from discrimination constitutes a substantial discriminatory effect. In short, Amendment 2 so "consistently degrades . . . one group of voters' influence on the political process as a whole" that it unconstitutionally deprives the individual plaintiffs of an equal opportunity for political participation.

II. EVEN IF AMENDMENT 2 IS ONLY SUBJECT TO RATIONAL BASIS REVIEW, AMENDMENT 2 BEARS NO RATIONAL RELATIONSHIP TO ANY LEGITIMATE STATE PURPOSE.

Amendment 2 is unprecedented in both the selectivity and severity of discrimination that it imposes on a particular group of persons. Never before in the history of this Court's equal protection jurisprudence has any state law ever declared that the government may not remedy "any" discrimination against a particular group, whether justified or not, whether private or governmental, in any and every context. This extraordinary removal of equal protection from the members of only one group cannot constitute "equal protection of the laws" under the Fourteenth Amendment even under the most lenient standard of equal protection review.

[25] *See* "Judge Is Censured Over Remark on Homosexuals," N.Y. Times, Nov. 29, 1989, at A28, col. 1.

A. If the Breadth and Selectivity of the Burdens Imposed by a Classification Can Only Be Explained by Antipathy Toward a Particular Group, Then the Classification Does Not Rationally Serve Any Legitimate Purpose.

At a minimum, equal protection requires that distinctions drawn by the government be "rationally related to a legitimate governmental interest." *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973); *see also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985). Under this standard of equal protection review, the Court engages in a two-part inquiry: the Court asks first whether a classification is intended to serve a legitimate state purpose, and second, whether the classification is rationally related to that purpose.

The State argues in its brief that Amendment 2 serves several legitimate purposes. None of those asserted purposes is rationally advanced by Amendment 2, and none of them can mask its true purpose: to harm a politically unpopular group. Before canvassing the State's asserted purposes, however, it is important to review two general principles for assessing their validity.

First, in assessing whether a purpose is legitimate, this Court consistently has held that antipathy arising out of hostility or groundless stereotypes is not a legitimate purpose justifying a law under the Equal Protection Clause. Accordingly, the Court presumes that a state law is valid only "absent some reason to infer antipathy." *F.C.C. v. Beach Communications*, 113 S. Ct. 2096, 2101 (1993) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). As this Court stated in *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), "[p]rivate biases may be outside the reach of the law, but *the law cannot, directly or indirectly, give them effect*" (emphasis added). This Court repeatedly has asserted that antipathy, by itself, is not a legitimate purpose even for non-racial discrimination. *See, e.g., Cleburne*, 473 U.S. at 447-48; *Moreno*, 413 U.S. at 534 ("a bare . . . desire to

harm a politically unpopular group cannot constitute a *legitimate* government interest") (emphasis in original).

If bare antipathy toward a group could justify discrimination against that group, then the requirements of the Equal Protection Clause would be meaningless. By definition, every classification serves the purpose of discriminating against the group that the classification burdens. Therefore, if the "rational basis" test has any content whatsoever, it cannot permit discrimination solely for discrimination's sake.

In determining whether a classification illegitimately imposes discrimination against the members of a group as an end itself, one important consideration is the breadth of the discrimination imposed.[26] If the legal classification insulates from legal remedy public or private discrimination against some group without limitation or qualification, then it is impossible to attribute any purpose to the classification apart from a generalized desire to discriminate. By its terms, such indiscriminate imposition of burdens reveals no attempt to draw a distinction in pursuit of some specific policy: rather, such a law declares a characteristic to be sufficient justification for discrimination regardless of any specific purpose. Such discrimination for the sake of discrimination is illegitimate. *See Citizens for Responsible Behavior v. Superior Court*, 1 Cal. App. 4th 1013, 1027-33, 2 Cal. Rptr. 2d 648, 656-60 (Cal. App. 1991).

Second, it is not enough that a classification has an *incidental* tendency marginally to advance a legitimate purpose; rather, there must be some plausible justification for the particular classification selected and some reasonable expectation that the classification will in practice achieve the purpose. *See Heller v. Doe*, 113 S. Ct. 2637, 2643 (1993) (to be rational, a classification "must find some footing in the realities of the subject addressed");

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[26] *See* Brief of Amici Curiae, State of Oregon, et al. at 11-16.

James v. Strange, 407 U.S. 128, 140 (1972) (equal protection requires "rationality in the nature of the class singled out"). For instance, a state law stripping all lesbians of their drivers' licenses would advance an interest in reducing traffic congestion, and reducing the number of drivers on the road is a legitimate state purpose. However, because the purpose does nothing to explain the law's particular selectivity – why lesbians rather than a more general group have been singled out to lose their drivers' licenses – the purpose cannot justify such a burden on lesbians alone.

This is not to say that states may not pursue a legitimate goal in an incremental fashion, "step by step . . . adopting regulations that only partially ameliorate a perceived evil." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). In contexts like public benefits legislation or economic regulation, where the legislature is faced with a continuum of activity that differs only by slight degrees, the legislature "must necessarily engage in a process of line-drawing." *F.C.C. v. Beach*, 113 S. Ct. at 2102.[27] This Court will not strike down such "regulatory line-drawing" if selectivity is only the incidental result of the need to draw some line among similarly situated persons. *Id.* However, the Fourteenth Amendment requires that the selectivity be justified by some legitimate purpose such as the practical difficulty of drawing a less arbitrary line. If drawing a less selective, less arbitrary line would be easy such that the selectivity is inexplicable except as

[27] The cases in which the Court has deferred to state classifications as constituting legitimate attempts to pursue a goal "one step at a time" have involved economic regulations, tax measures, or distribution of social welfare benefits. *See, e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955). The Court repeatedly has noted the extraordinary deference with which such legislation governing "economics and social welfare" is treated. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

antipathy toward a disfavored group, then the classification violates the Equal Protection Clause.

B. None of the State's Proffered Interests Bears a Rational Relation to Amendment 2.

The State proffers six purposes (under three headings) that are allegedly served by Amendment 2: (1) the protection of religious freedom; (2) the protection of associational privacy; (3) the protection of the "integrity" of civil rights laws; (4) the promotion of uniform civil rights laws; (5) the protection of parental ability to inculcate their children with traditional moral values; and (6) the "deterrence of factionalism."[28]

In justifying Amendment 2 as a good-faith effort to advance these purposes, the State paints a distorted picture of the amendment as a benign and libertarian "shield" barring intrusive regulations of private persons. Amendment 2 is nothing of the sort. It is a "sword" that strips only one group of persons of protection from governmental and private discrimination. As explained below, Amendment 2's selective imposition of burdens is not a good-faith attempt to draw a line that incidentally burdens gay people. Rather, Amendment 2's selectivity can be explained only by the illegitimate purpose of targeting gay people based on antipathy and stereotypes.

1. Amendment 2 Is Not Rationally Related to Any Legitimate Interest in Religious Freedom or Associational Privacy.

The State characterizes Amendment 2 as a rational way to protect "core religious values" and associational privacy. State Br. 45. These interests, however, cannot

[28] *See* Brief Amicus Curiae of the American Bar Association for analysis of other purposes proffered by the State at earlier stages of this case.

explain either Amendment 2's sweeping ban on protection or its selective concentration of burdens on one group.

There is no dispute that Amendment 2 bans policies that forbid governmental discrimination. Yet government must operate on purely secular motives and has no legitimate interest in engaging in religiously motivated discrimination. Allowing the Denver police department, state judges, government supervisors, or other state actors to discriminate on the basis of "homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships" does not legitimately advance religious liberty.

Amendment 2's scope is so sweeping that it is implausible to surmise that it was intended as even a "rough accommodation" of individual freedom. Neither the government nor any of its officials or agents may act upon "religious" views about gay people, nor have they any constitutional right to association. Thus, even the most expansive claims for the protection of religious liberty and associational privacy do not provide any reason for prohibiting remedies for governmental discrimination. Given that "a more precise and direct classification is easily drawn," *Williams v. Vermont*, 472 U.S. 14, 23 n. 8 (1985), Amendment 2's total elimination of all protection from even governmental discrimination is not a good-faith effort to accommodate religious liberty or associational privacy.

This lack of a good-faith, plausible relationship between Amendment 2 and individual freedom is reinforced by the amendment's selectivity. Amendment 2 eliminates all protection from discrimination on the basis of gay, lesbian, and bisexual orientation even when other persons' individual freedom is plainly not at stake – but it leaves in place laws prohibiting discrimination based on numerous other characteristics such as marital status and

any legal off-duty conduct that implicate religious and associational freedom no less than any law excluded by Amendment 2.[29] Amendment 2's indifference to religious liberty and associational freedom except when pursued at the expense of gay people indicates that protection of such freedoms is a pretext for hostility and bias, not a rationally attributable purpose.

2. Amendment 2 Is Not Rationally Related to Protecting the Integrity of Civil Rights Laws.

The State argues that anti-discrimination laws that protect gay people from discrimination divert governmental resources from the more urgent goal of protecting "suspect classes" from discrimination. Therefore, according to the State, eliminating all such protection for gay, lesbian, and bisexual persons protects the "integrity" of civil rights laws. State Br. 41-42. This is not a serious contention.

Again, Amendment 2 sweeps so far beyond the State's proffered interest that the interest can only be a pretext. Amendment 2 eliminates laws prohibiting *governmental* discrimination based on gay, lesbian, or bisexual orientation. But requiring government to *refrain* from invidious discrimination does not consume governmental resources. Moreover, many of the laws eliminated by

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[29] Testimony at trial indicated not a single instance in which religious liberty had ever been burdened by Colorado laws or ordinances forbidding discrimination on the basis of sexual orientation. R.16:1075; Durgin aff. at ¶ 22; R.19:1350. The State's reliance on Artine Yapoujian's affidavit to establish the contrary proposition is curious, given that Yapoujian, an employer who fired a gay employee, testified that he had no objection to homosexuality. Yapoujian aff. at ¶ 10; R.18:1343.

Amendment 2 are *privately enforced*: they divert no government resources away from the protection of "suspect classes."

More important than these flaws with the State's argument, however, is the State's complete failure to provide any plausible explanation for Amendment 2's selectivity. Amendment 2 allows state and local law to protect a multitude of groups from discrimination that are not "suspect classes": state and local laws currently prohibit discrimination on the basis of marital status, veteran's status, and *any* legal off-duty conduct like smoking. Amendment 2 even allows local governments to continue to protect persons from discrimination on the basis of heterosexuality. Nothing in the State's proffered purpose explains why the preservation of state resources requires that gay people be denied all protection from discrimination on the basis of their sexual orientation, while everyone else – from smokers to heterosexuals to divorcees – may continue to be protected.

The State seems to assume that, because Amendment 2 could (in theory) conserve resources for legitimate goals like protection of "suspect classes," Amendment 2 therefore serves a legitimate purpose in a rational manner. However, unless the proffered purpose can explain Amendment 2's selectivity, it provides no rational justification for Amendment 2. Otherwise, state law could always selectively withdraw any governmental service or protection from any set of individuals. For instance, the State's logic would permit state law to bar gay people from receiving police protection in their neighborhoods,[30] on the theory that elimination of such protection would save government resources which could then be devoted to the better protection of "suspect classes." Of course,

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[30] This is not an unimaginable scenario; the Denver Police Department's regulations barring such discrimination against gay people would be nullified by Amendment 2.

such selective withdrawal of governmental protection would be unconstitutional for the same reason that Amendment 2 is unconstitutional – because, like Amendment 2, it singles out gay people for discriminatory treatment without justification for such selectivity.

The State contends that singling out gay people serves a legitimate purpose because "special protection for suspect and other needy classes should not give way to the demands for inclusion of a politically powerful and relatively privileged special interest group." State Br. 42. The contention is both untrue and irrelevant. To justify the selectivity of Amendment 2's classification, one must assume that gay people are less worthy of protection from discrimination not only than "suspect classes" but also than *every* other conceivable group of people, because all such groups are protected from discrimination in at least some contexts and all can obtain such protection without amending the state constitution.

Such an assumption lacks any "footing in the realities of the subject addressed by the legislation." *Heller*, 113 S. Ct. at 2643. As Judge Posner has noted:

> [I]s there any reason to exclude homosexuals from a protected category that already includes not only racial, religious, and ethnic groups but also women, the physically and mentally handicapped, all workers aged 40 and older, and, in some cases, even young healthy male WASPs? Is there less, or less harmful, or less irrational discrimination against homosexuals than against the members of *any* of these other groups? The answer is no.

Richard Posner, *Sex and Reason* 323 (1992) (emphasis in original). Because the State's purpose of preserving the integrity of civil rights law does nothing whatsoever to explain Amendment 2's selectivity, it cannot provide a rational basis for the amendment.

3. Amendment 2 Is Not Rationally Related to the Creation of Uniform Civil Rights Laws.

The State contends that Amendment 2 promotes state-wide uniformity of civil rights laws, "thereby providing greater economic and legal predictability in [business] affairs." State Br. 47. Once more, however, the State fails to explain either Amendment 2's scope or its selectivity. Amendment 2 eliminates even state-wide statutes such as laws prohibiting arbitrary discrimination in insurance. Had the purpose of Amendment 2 been concerned at all with uniformity, it would have been an easy matter to exclude from its scope all state-wide laws protecting gay people from discrimination.

Again, the selectivity of Amendment 2 indicates that it cannot plausibly be read as a good-faith effort to achieve state-wide uniformity concerning civil rights. While eliminating uniform state laws that protect gay people, Amendment 2 tolerates any degree of disuniformity in local anti-discrimination laws so long as the laws provide no relief from discrimination based on gay, lesbian, or bisexual orientation. Both Amendment 2's selectivity and severity, in short, indicate that promotion of uniformity is but a pretext, a goal about which the State is utterly indifferent except as a cover for burdening gay people.

4. Amendment 2 Is Not Rationally Related to the Purpose of Inculcating Children with "Traditional Moral Values."

The State argues that Amendment 2 advances the goal of "familial privacy" by assisting "the efforts of some parents to teach traditional moral values."[31] State Br. 46. According to the State, anti-discrimination laws

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[31] Of course, no one has a privacy interest in ensuring that government endorses their point of view. *Block v. Meese*, 793 F.2d 1303, 1312-14 (CADC 1986) (per Scalia, J.).

forbidding arbitrary discrimination on the basis of sexual orientation implicitly endorse homosexuality. *Id.* Therefore, the State argues that by forbidding such laws and their alleged message that "traditional and alternative families" are morally and socially equivalent, Amendment 2 assists parents in their efforts to convey traditional values to their children. *Id.*

This argument is based on the erroneous premise that government "endorses" lesbian, gay, or bisexual orientation by forbidding discrimination on the basis of sexual orientation in certain governmental or commercial contexts. By the State's reasoning, when government forbids private employers from discriminating against Buddhists on the basis of their Buddhism, it endorses Buddhism and prevents parents from inculcating their children with non-Buddhist religious principles. Such reasoning would render much of federal anti-discrimination law an unconstitutional establishment of religion. *But see Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring) (explaining why much federal anti-discrimination law, including that banning religious discrimination by employers in interstate commerce, does not endorse religion in violation of First Amendment's Establishment Clause). As the Colorado Supreme Court noted, the State's analysis of anti-discrimination law is specious. Anti-discrimination laws "make no assumptions about the morality of protected classes – they simply recognize that certain characteristics, be they moral or immoral, have no relevance in enumerated commercial contexts." 882 P.2d at 1347, Pet. App. B-19.

The Court need not decide whether preservation of traditional sexual morality can be a legitimate purpose for a legislative classification.[32] Amendment 2 is far too

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[32] This Court's holding in *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) provides no support for the State. *Bowers* held only that the "presumed belief of a majority . . . that homosexual

broad to be a rational means of preserving traditional sexual morality. Amendment 2 insulates discrimination on the basis of gay, lesbian, and bisexual orientation from "any" remedy under "any" law, even if such discrimination is unrelated to sexual conduct or sexual mores. It defies even the lenient standards of the "rational basis" test to argue that traditional sexual morality is protected by barring remedies for discrimination by police officers and insurers.

5. Amendment 2 Is Not Rationally Related to any Legitimate Purpose of Deterring Factionalism.

The State contends that Amendment 2 serves the legitimate purpose of deterring "factionalism" because it "seeks to ensure that the deeply divisive issue of homosexuality's place in our society does not serve to fragment Colorado's body politic." State Br. 47. The State's argument is without merit. The "deterrence of factionalism," as defined by the State, is not a legitimate purpose.

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sodomy is immoral and unacceptable" could provide a rational basis for a statute criminalizing a type of sexual conduct. *Id.* at 196. But, even if an interest in preserving traditional sexual morality can justify state laws that actually regulate sexual conduct, such an interest cannot justify Amendment 2's blanket authorization of *all* discrimination against a class of people, even discrimination in contexts that are unrelated to sexuality or sexual conduct. (It should be noted that Colorado law does not criminalize sodomy.) Moreover, even if protection of morality is a legitimate purpose as a general matter, a moral precept that is nothing more than antipathy toward one group cannot justify discrimination. *Cleburne*, 473 U.S. at 447; *Moreno*, 413 U.S. at 534; *see* John Higham, *Strangers in the Land: Patterns of American Nativism*, Rutgers Univ. Press (1988) 26-27, 66-67, 92, 160 (Irish, Catholics and Jews characterized by some Americans as inherently morally deficient).

Amendment 2 supresses "factionalism" only by suppressing one side of political debate. But, "factionalism" is the foundation of political democracy; it is precisely the sort of debate protected by the Equal Protection Clause and the First Amendment that the State has no legitimate interest in suppressing. *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2547 (1992) (First Amendment does not permit city "to impose special prohibitions on those speakers who express views on disfavored subjects"); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981) ("there is no significant state or public interest in curtailing debate and discussion of a ballot measure"); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored *or more controversial views*") (emphasis added).

C. The Selectivity, Severity and Legislative History of Amendment 2 Demonstrate that Its Burdens on Gay People Can Only Be Attributable to Antipathy, an Illegitimate State Purpose.

The issue in this case is not whether it might be rational to discriminate on the basis of sexual orientation in some specific context for some specific legitimate purpose. The Court can and should leave for another day the question of whether some legitimate purpose can justify such limited discrimination. Rather, the question in this case is whether there is a rational basis for constitutionally insulating every type of public and private discrimination against gay people in every context from any remedy, regardless of the circumstances or purposes of such discrimination. Amendment 2 provides blanket immunity for discrimination based on gay orientation. Therefore, in order to uphold Amendment 2, the Court would have to find that such orientation is always a rational basis for any sort of discrimination.

Such a holding, like Amendment 2 itself, would be unprecedented: *no* classification, however rational in some circumstance, is *always* a rational basis for discrimination. Rather, the foundation of the "rational basis" test is that law-makers and enforcers ought to possess the flexibility to determine the specific circumstances under which some non-suspect classification might be prudently employed. *Cleburne*, 473 U.S. at 445. Amendment 2 rejects all such flexible and nuanced approaches and declares that gay orientation is always, in effect, a rational basis for discrimination. Such a sweeping law cannot be explained by any specific interest in pursuing some specific policy. Rather, a blanket prohibition on protection in every context, even unforeseen, indicates only a purpose to engage in discrimination for discrimination's sake. As explained above, such a purpose is not legitimate under the Equal Protection Clause.

Amendment 2's legislative history amply confirms its illegitimate purpose of giving legal effect to antipathy toward gay people. *See Cleburne*, 473 U.S. at 453 n. 6 (Stevens, J., concurring) (if classification motivated by antipathy, plausibility decreases that classification is legitimate effort to address problem incrementally). That antipathy was made explicit by the campaign materials distributed by the amendment's sponsor. CFV promoted Amendment 2 on the eve of the election by distributing to 800,000 households in the state a brochure making the baseless accusation that "[s]exual molestation of children is a large part of many homosexuals' lifestyle – part of the very lifestyle 'gay-rights' activists want government to give special class, ethnic status!" Df.Ex. W (lodged concurrently with Joint Appendix) at 2; R.15:735.[33]

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[33] Gay men and lesbians are stereotyped frequently but erroneously as child molesters. R.6:105. A study of 269 perpetrators of sexual assaults on children in Denver during the two years before Amendment 2's passage found that all but two of the assaults were committed by people identified as heterosexual. R.14:679-86.

Much of the material about gays as pedophiles, used in the anti-gay rights initiatives across the country, was generated by the Family Research Institute and its founder, Paul Cameron, a psychologist. *See* amicus curiae brief filed by FRI on May 4, 1994 in Colo. Sup. Ct. at 3,17,20,25. Cameron has been sanctioned by the American Psychological Association, the American Sociological Association, and the Nebraska Psychological Association for unethical conduct and the misuse of data. R.6:93; 8:88; 13:281,284. CFV officials acknowledged both their reliance on Cameron's research and their knowledge that Cameron had been sanctioned. R.15:773-79; 16:1053.

As the Court has noted, a classification's selectivity must be assessed according to "the realities of the subject addressed by the legislation." *Heller*, 113 S. Ct. at 2643. Here, the realities are that all of the claimed justifications for this amendment are makeweight. Its real purpose is the effectuation of hostility and antipathy toward an unpopular group.

By whatever standard the Court judges such an amendment, Amendment 2 cannot survive the requirements of the Equal Protection Clause.

CONCLUSION

The judgment of the Colorado Supreme Court should be affirmed.[34]

Respectfully submitted,

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[34] If this Court reverses the judgment of the Colorado court, the case should be remanded for consideration of the issues that the district court did not address, including the plaintiffs' claim that Amendment 2 violates the First Amendment.